



Legal Update

December 31, 2014

Based on the totality of the circumstances, the 1st Circuit Court upholds conducting a patfrisk of gang members.

United States v. Raymond Martinez, United States 1st Circuit Court, No. 12–2219, (2014)

Background: Framingham police were concerned that there could be gang violence following a wake for two Latin Kings members who were killed. Framingham police officer Robert Lewis (hereinafter referred to as “Officer Lewis”) and Detective Matthew Gutwill (hereinafter referred to as “Detective Gutwill”) were assigned to monitor the area around the church where the wake was held. When the wake concluded Detective Gutwill observed a number of cars and people gathering near Roosevelt Park. Although Detective Gutwill did not recognize any of the people as gang members he relayed to dispatch that “something wasn't right.” Officer Lewis drove to the park and as he approached, a silver car left with tires screeching.

When the silver car ran a red light, Officer Lewis stopped it and observed that there were (4) occupants inside. Officer Lewis was aware that the front-seat passenger, Raymond Martinez, (hereinafter referred to as “Martinez”) and the driver Michael Tisme, (hereinafter referred to as “Tisme”) were members of the “Bloods” street gang. Additionally, Officer Lewis knew that Martinez had previously been charged with assault and battery and dangerous weapons offenses. While speaking with Tisme, Officer Lewis ordered all the occupants inside the car to keep their hands visible and he specifically ordered Martinez to keep his hands on the dashboard. When Tisme was unable to provide a license or registration, Officer Lewis arrested him. At this time, Officer Lewis observed Martinez pull his hands off the dashboard and reach toward his waist.

Detective Gutwill arrived to assist Officer Lewis and he also observed Martinez moving his hands off the dashboard toward his waist. There was conflicting evidence as to whether the police actually saw Martinez was reaching for a phone near his waist. The motion judge concluded that the police were unaware that Martinez was grabbing his phone. During the motion Martinez's phone records were admitted and confirmed that Martinez made a twelve second phone call during the traffic stop.

Sergeant Kathryn Esposito (hereinafter referred to as "Sgt. Esposito"), removed Martinez from the vehicle when she arrived on scene and observed him reaching for his waist. Sgt Esposito conducted a pat-frisk of Martinez and felt a hard object similar to the butt of a gun around Martinez's waistband. Sgt Esposito asked Martinez, "What's this?" and when he failed to respond, she told him not to move and then pulled the object-a loaded firearm from his waistband. Martinez was arrested and indicted for being a felon in possession of a firearm that had traveled in interstate commerce. See 18 U.S.C. § 922(g)(1). Martinez filed a motion to suppress the firearm arguing that the officers had no reasonable suspicion that he was armed and dangerous when he was frisked. See *Terry v. Ohio*, 392 U.S. 1 (1968). The motion was denied and Martinez entered a guilty plea conditioned on the right to appeal that ruling.

Martinez received an enhanced prison sentence because the offense he pled to was classified as a crime of violence. Martinez appealed the enhanced sentence and the denial of his motion to suppress. The key issue the 1st Circuit Court considered was whether the police had sufficient reason to assume that the Martinez was armed and dangerous based on the totality of the circumstances.

Conclusion: The 1st Circuit Court upheld the denial of Martinez's motion to suppress and concluded that the frisk of Martinez was reasonable under the Fourth Amendment. With regard to the appeal related to the enhanced sentence, the 1st Circuit Court remanded for further proceedings.

1st Issue: Based on the totality of the circumstances did the police have enough to frisk Martinez?

The 1st Circuit Court concluded that the frisk of Martinez was supported by reasonable suspicion. Martinez argued that his movements were not furtive or suspicious and that the totality of the circumstances failed to give rise to the particularized suspicion necessary to conduct a patfrisk. One of the factors the 1st Circuit Court analyzed was that Martinez repeatedly moved his hands to his waist. Martinez's failure to comply with police orders was further evident by the fact that he was able to place a twelve-second telephone call during the stop. The 1st Circuit Court noted that even if Martinez was only reaching for his cell phone, it was still reasonable for police to perceive he may be reaching for a weapon.

Second, Martinez argues that even if police were unaware that he was reaching for his phone, police still lacked a sufficient reasonable belief that he was armed and dangerous. According to Martinez, the frisk was not lawful because police acted on "a mere hunch," rather than having "articulable facts" or reasonable suspicion of criminal activity. See, e.g., *United States v. Romain*, 393 F.3d 63, 71 (1st Cir.2004). Relying upon the holding from *Terry v Ohio*, the 1st Circuit Court stated that the Fourth Amendment "permits a reasonable search for weapons for the protection of the police officer, where the police officer has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The 1st Circuit Court does not require that "an officer be

absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Id.*

The 1st Circuit Court had previously found that the police were justified in a limited weapons search of two men, one a known gang member with a criminal record, drive up to a hospital where two gang members who had been shot had been taken, leave at a high rate of speed with others, and appear “suspiciously nervous” as police approached them.” *United States v. McGregor*, 650 F.3d 813, 821–23 (1st Cir.2011), at 821.

In the present case, the police had concerns that gang violence may escalate following a wake of murdered “Latin Kings” member. Similar to *McGregor*, the police were in a highly volatile situation and they relied not simply on gut feelings, but on objectively reasonable justifications for suspecting that an individual acting suspiciously during a traffic stop may be armed and dangerous. Both Martinez and Tisme were members of the Bloods street gang and Martinez had a prior history dangerous weapons offenses and with assault and battery. Additionally, Martinez repeatedly failed to keep his hands on the dashboard despite orders from three (3), separate police officers. Aside from Martinez’s prior record, the police here had additional factors that pointed toward a reasonable likelihood that Martinez was armed and potentially dangerous. Considering the nature of the occasion, the reaction of a car full of gang members when a police car approached, and the refusal to keep hands visible, the 1st Circuit Court held that the police were justified in conducting a patfrisk of Martinez and the denial of the motion to suppress was upheld.

Commentary: This case serves as an excellent review of the legal requirements of a frisk for weapons. Police officers are not required to be exactly certain of what a weapon is before conducting a patfrisk of a person inside a motor vehicle. If there is concern for officer safety, the courts in most cases, give police officers latitude to conduct a limited search for weapons.

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